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Working Group on Arbitrary Detention

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No. 13/2013 (Switzerland)

Communication addressed to the Government on 28 February 2012

Concerning: Mohamed El Ghanam

The Government replied on 30 April 2012.

The State is a party to the International Covenant on Civil and Political Rights.

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. In accordance with its methods of work, the Working Group transmitted the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, as established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

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(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. This case was submitted to the Working Group on Arbitrary Detention in the following terms.

4. Mohamed El Ghanam, an Egyptian national, was born in 1957. Before leaving Egypt, he was a colonel in the Army and director of the Legal Research Department of the Ministry of the Interior.

5. Mr. El Ghanam's case was submitted to the Working Group on Enforced or Involuntary Disappearances in 2007. On the basis of information submitted by the Swiss Government, the Working Group on Enforced or Involuntary Disappearances decided to consider Mr. El Ghanam's case clarified in 2009.

6. Mr. El Ghanam was granted asylum in Switzerland on 31 July 2001, on the basis of the intimidation he had been subjected to in Egypt for refusing to help fabricate evidence against opponents of the regime of the former President, Mr. Hosni Mubarak.

7. Starting in 2002, Mr. El Ghanam was regularly approached by the Swiss Federal Intelligence Service (FIS), who wanted him to infiltrate Geneva's Muslim community. Mr. El Ghanam refused to cooperate with the Swiss intelligence services and when they persisted filed a series of complaints with the Geneva police in October 2004 and January 2005. He also complained to the Geneva Cantonal Parliament in February 2005. No action was taken on these complaints.

8. The source describes three periods of detention. The first was from 16 February to 21 June 2005, after Mr. El Ghanam was arrested on 15 February 2005 for having threatened and injured a person in the street. The source says that Mr. El Ghanam was charged but was not allowed to produce witnesses to the investigating judge in the case. Moreover, the lawyer assigned to him by the Geneva court advised Mr. El Ghanam to withdraw his complaints against the Federal Intelligence Service. Mr. El Ghanam was placed in pretrial detention at Champ-Dollon prison on 16 February 2005. On 21 June 2005 he was released under a provisional release order from the Indictment Division.

9. The second period of detention was from 10 November 2005 to 1 May 2006. According to the source, an official of the Federal Office of Police wrote to the deputy prosecutor in Mr. El Ghanam's case on 6 October 2005, notifying her of comments made by Mr. El Ghanam that could represent a threat to Switzerland's internal and external security. The official is said to have suggested that he should be hospitalized. After this exchange, Mr. El Ghanam was arrested and forcibly interned in the psychiatric hospital of Belle-Idée, Geneva, on 10 November 2005. Three weeks later an order was given for his transfer to Champ-Dollon prison and he was never given a chance to mount a defence.

10. On 28 April 2006, the Indictment Division refused to extend Mr. El Ghanam's pretrial detention. However, as he was subject to a Federal Council expulsion order, he was placed in administrative detention the same day. By a decision of 1 May 2006, the Cantonal

Asylum Appeal Commission finally decided to lift the administrative detention order and Mr. El Ghanam was released.

11. The third period of detention started on 12 March 2007. On 30 January 2007, the criminal case having been referred back to it by the prosecutor, the Indictment Division ordered Mr. El Ghanam to be detained, on the grounds that he had a psychiatric disorder that could disrupt national security. On 12 March 2007, therefore, Mr. El Ghanam was once again imprisoned in Champ-Dollon, for medical reasons.

12. The source maintains that the decision to detain Mr. El Ghanam was made on the basis of a medical report and yet Mr. El Ghanam had never been examined in person as he had consistently refused to undergo any psychiatric examination. Two hearings were held, on 18 October 2011 and 10 January 2012, to evaluate Mr. El Ghanam's psychiatric condition, but he did not attend.

13. Mr. El Ghanam is still being held in Champ-Dollon prison and is undergoing medical treatment against his will. According to the source, his health is deteriorating.

14. The source contends that Mr. El Ghanam's deprivation of liberty is a result of his refusal to cooperate with the Federal Intelligence Service.

15. The source also argues that Mr. El Ghanam's deprivation of liberty is a violation of the guarantees of a fair and just trial, being based on an evaluation of his psychiatric condition even though he had never agreed to an examination in person. His detention is therefore contrary to article 9, paragraph 1, of the International Covenant on Civil and Political Rights, to which Switzerland is a party, which states that "no one shall be subjected to arbitrary arrest or detention". The Covenant goes on to say that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". Mr. El Ghanam's deprivation of liberty is also contrary to article 14, paragraph 1, of the Covenant, which guarantees that, "in the determination of any criminal charge against him … everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

16. The source also states that Mr. El Ghanam is being held in a prison facility not designed for patients with psychiatric disorders, which is a violation of article 10, paragraph 1, of the Covenant, whereby "all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

Response from the Government

17. In its reply dated 30 April 2012, the Government recalls the importance it attaches to the protection of and respect for human rights, without discrimination, and makes reference to the applicable law. It then gives its reply in respect of the three periods of detention that are the subject of the allegations.

18. As regards the first period of detention, the Government maintains that Mr. El Ghanam was arrested on 15 February 2005 for attacking another person with a knife. A detention order was issued on 16 February 2005 for threatening behaviour and attempted murder, and all procedural guarantees were applied. On 21 June 2005 provisional release was ordered by the Indictment Division.

19. The second period of detention can be divided into three stages. First, from 10 to 30 November 2005, involuntary admission to the psychiatric clinic at the request of a physician with a mandate from the Psychiatric Oversight Board; all procedural guarantees provided by law were applied. Secondly, on 21 November 2005, Micheline Spoerri, Cantonal Councillor with responsibility for justice, the police and security, brought a complaint against Mr. El Ghanam for insulting behaviour, attempted coercion or threats; the investigating judge requested a psychiatric examination on 25 November 2005 and

issued a detention order on 1 December 2005. This detention was appealed before the investigating judge and the Indictment Division, and the Indictment Division ordered his release on 28 April 2006. Lastly, that same day, a criminal investigation officer issued an arrest warrant against Mr. El Ghanam based on the law on the residence of foreigners, as a means of enforcing the expulsion decision; on 1 May 2006 the appeals board of the Aliens Registration Office annulled the warrant, and that decision was later upheld appeal by the criminal investigation officer.

20. As to the third period of detention, on 30 January 2007 the Indictment Division ordered the case against Mr. El Ghanam to be dropped on the grounds that he was not liable for the 15 February 2005 incident and, because he was a danger to society, ordered him to be detained in Champ-Dollon prison, where there is a medical service that is run by the University and not by the prison authorities. This detention order is reviewed at regular intervals in accordance with the procedures provided for by law.

21. Based on these arguments, the Government considers itself to be in strict compliance with the provisions of articles 9 and 14 of the International Covenant on Civil and Political Rights; a guardian was appointed on 6 August 2006 to enable Mr. El Ghanam to exercise his rights and legal assistance resumed on 19 July 2011. The Government also states that, according to the specialists assigned to the case, "Mr. El Ghanam is suffering from several conditions, no treatment is possible without his cooperation and detention is necessary to prevent him being a danger to others". Another examination has been ordered but Mr. El Ghanam refuses to cooperate in any way.

Further comments from the source

22. In comments dated 2 May 2012, the source states that, as regards the assault he was accused of, Mr. El Ghanam acted in legitimate self defence. Although his request for four witnesses to be heard by the investigating judge at the hearing of 14 May 2005 was turned down, he acknowledges that during this period (15 February–14 March 2005) procedural safeguards were applied and his detention may be considered lawful.

23. The source goes on to say that government authorities put pressure on the judiciary, as shown by a letter dated 6 October 2005 from the head of the civil intelligence services to the investigating judge, recommending deprivation of liberty for Mr. El Ghanam; a letter dated 25 October 2005 from the Special Investigation Brigade falsely stating that Mr. El Ghanam had stabbed his victim in the abdomen, which had influenced the Psychiatric Oversight Board, whose report had formed the basis for his detention; and a letter of 7 December 2005 from the head of the civil intelligence services to the prosecutor, expressing his concern at the prospect of release under the criminal charges and suggesting enforcement of the decision to remove Mr. El Ghanam, which would entail administrative detention.

24. In the source's view, all this correspondence influenced the course of justice and the use of measures of deprivation of liberty against Mr. El Ghanam.

25. Lastly, the source maintains that, although the courts had had the psychiatric report since July 2006, nothing was done to ensure the defence of Mr. El Ghanam's rights and he was left without a lawyer and without a guardian. He was not called to the hearing of 23 January 2007 and received no notification of the Indictment Division's decision on detention.

Discussion

26. No account can be taken of the claims made above by the source, which were never mentioned until these comments were submitted and were not communicated to the Swiss Government, which was therefore unable to reply.

27. To recap, the claims that have been communicated to the Government are that Mr. El Ghanam is still in Champ-Dollon prison and undergoing treatment against his will, that his detention is a result of his refusal to cooperate with the Federal Intelligence Service, and that the right to a fair trial has been violated inasmuch as detention is based on a psychiatric evaluation even though Mr. El Ghanam refused to be examined.

28. In its reply, the Government states that, even though Mr. El Ghanam refuses to cooperate in his treatment, his rights have been respected; that the grounds for his detention are offences against criminal law and his state of mental health; that the provisions of articles 9 and 14 of the International Covenant on Civil and Political Rights have been observed to the letter insofar as he has had a lawyer, and that this lawyer has had access to his file and has availed himself of all legal remedies, resulting in his client's release on several occasions and a decision not to proceed against him.

29. In addition, the record of the sentence enforcement court hearing of 10 January 2012, as produced by the source, shows that counsel and the guardian were in attendance. The record states that Mr. El Ghanam's lawyer pleaded as follows: "Requests that Mr. El Ghanam be forcibly brought before this court; requests that the court also rule on the lawfulness of detention; states that the conditions for revocation of conditional release from detention and for reintegration have not been met; states that the conditions for therapeutic measures in confinement have not been met given that treatment has failed".

Disposition

30. To all intents and purposes, the above-mentioned extract from the record of the hearing, together with the fact that the source itself confirms the lawfulness of detention between 15 February and 14 March 2005, confirms the Government's reply.

31. Accordingly, the Working Group, on the basis of paragraph 17 (a) of its methods of work, finds that this is not a case of arbitrary detention.

[*Adopted on 26 August 2013*]